No. 2614

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PAUL SCHARRENBERG,
Plaintiff in Error,

vs.

THE DOLLAR STEAMSHIP COMPANY, DOLLAR STEAMSHIP LINE, THE ROBERT DOLLAR COMPANY, Corporations, and JAMES ABERNETHY,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

NATHAN H. FRANK,
Attorney for Defendants in Error.

No. 2614

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PAUL SCHARRENBERG,
Plaintiff in Error,

vs.

THE DOLLAR STEAMSHIP COMPANY, DOLLAR STEAMSHIP LINE, THE ROBERT DOLLAR COMPANY, Corporations, and JAMES ABERNETHY,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

Statement of Facts.

The complaint in question alleges the incorporation of the defendants; that they were operators of a British merchant vessel known as the "Bessie Dollar", and also of an American merchant vessel known as the "Mackinaw"; and that the defendant Abernethy was the master of the "Bessie Dollar".

Then follow the allegations charging the liability, namely:

"III.

"That as plaintiff is further informed and believes, and so avers, the defendants herein at the

times hereinafter mentioned, knowingly assisted and encouraged the importation and the migration of a certain contract laborer and alien person, named Dung Pau, into the United States of America, for the purpose of his performing labor in the said United States, he at all of the times herein mentioned being a Chinese person, whose birth place and residence was and is the City of Shanghai, in China, as follows:

"IV.

"That on the 3d day of December, A. D. 1913, the said vessel, 'Bessie Dollar', was lying in the port of Shanghai, in China, with a full complement of officers and a full crew on board, each of whom had signed shipping articles to serve in their respective capacities on said vessel on a voyage thence to other parts of the world and return, and at that time the defendants herein other than the defendant James Abernethy, desiring to procure a Chinese person, alien and contract laborer to bring to the United States of America to perform labor for them therein, to wit, to serve as a seaman on board of the said vessel 'Mackinaw', and with that intent they caused the said James Abernethy to engage said contract laborer for that purpose, which he did, and to, and he did enter into a contract in writing with said contract laborer before a Consul of Great Britain at said Shanghai, which said contract was a contract designated and known as shipping articles, and in the instance herein mentioned, were additional and other shipping articles to the shipping articles already as hereinbefore mentioned signed by the officers and crew of the said vessel 'Bessie Dollar', which said additional shipping articles were signed by the said defendant Abernethy and the said contract laborer at the request of the other defendants herein, the said Abernethy and the said contract laborer both signing the same as aforesaid, and in said shipping articles the said contract laborer agreed to go on board of the said vessel 'Bessie Dollar' and work for defendants, and

they agreed to employ him thereon and to bring him to the said United States so that he could work for the said defendants therein other than said defendant Abernethy, although at that time no seaman or other persons were needed to work upon the said 'Bessie Dollar', the said shipping articles so signed by said Abernethy and the said contract laborer describing the latter's employment as follows; that is to say said contract laborer was to work as a purported seaman on said vessel 'Bessie Dollar':

"'On voyages from Shanghai to San Francisco, there to join the S. S. "Mackinaw" or any other vessel, within the limits of 70 degrees north and 70 degrees south latitude, trading to and from as may be required, and back to Shanghai, to be discharged with consent of local authorities. Term of service not to exceed two (2) years. The master has the option to transfer any and all of the within mentioned persons to any other British or foreign ship bound to Shanghai in the same capacity and at the same rate of wages.'

"That the real purpose of defendants other than the defendant Abernethy was to employ said contract laborer within the United States of America, and that after the signing of the said contract and on or about the 3d day of December, 1913, the said contract laborer went on board the said vessel 'Bessie Dollar' at said Shanghai, and was by the defendants brought on said vessel to the Port of San Francisco, in the State of California, he working as a seaman on said vessel on her passage from said Shanghai to said Port of San Francisco, at which last named place and on or about the 15th day of January, 1914, at said last named place, the defendants caused the said contract laborer to be discharged from said vessel, and he was by them discharged from service on her, and thereafter and upon the same day the defendants herein other than the defendant James Abernethy, in pursuance of the purpose for which they had brought the said con-

tract laborer from said Shanghai, hired and employed him in the said Port of San Francisco, and caused him to sign a contract of shipment before the United States Shipping Commissioner for the said Port of San Francisco, on a voyage on said vessel described in said contract of shipment as follows:

" 'From San Francisco, Cal., to Shanghai, China, and such other Asiatic ports as the master may direct, via Grays Harbor, Seattle, Wash., and such other ports on the Pacific coast as the master may direct; final port of discharge shall be Shanghai, China.'

"That the Grays Harbor and the Seattle mentioned in said contract of shipment are each ports, to wit, seaports in the State of Washington. That after the signing of such shipping articles or contract of shipment the said contract laborer went on board the said vessel 'Mackinaw' in the employ of defendants other than said James Abernethy, at said Port of San Francisco, on or about the said 15th day of January, 1914, under and pursuant to his said hiring at said Shanghai, to work as a seaman on said vessel 'Mackinaw', and worked on board of said vessel in the said Port of San Francisco, for some days, and also on a voyage of said vessel from said San Francisco to said Grays Harbor and at said Grays Harbor also worked on said vessel as a seaman and pursuant to his said hiring, and did and is now so performing labor on board of said vessel.

"That at all the times herein mentioned, unemployed labor of a like kind to that performed, and for which the said contract laborer was so contracted with at said Shanghai to perform could have been found in the United States of America, and particularly in those parts of the United States of America where the said vessel from time to time was, and could have easily been found in the Port of San Francisco, in the State of California, on the 3d day

of December, 1913, and for a long time prior thereto, and at all times since.

"That by reason of the foregoing plaintiff has been wronged and damaged, and the said defendants have become indebted to the plaintiff in the sum of one thousand ($1,000.00) dollars, plaintiff having been wronged and damaged in that amount, none of which has been paid."

The other eighteen counts are of the same tenor, each simply referring to Paragraphs I, II, and IV of the first count, and re-stating Paragraph III, except for the change in the name of the Chinese alleged to have been imported.

To each of said counts a demurrer was interposed upon the ground that it failed to state a cause of action.

This appeal is from the order sustaining said demurrer.

Argument.

The statute upon which the complaint is founded is the Immigration Act of February 20, 1907 (34 Stat. 898) as amended by the Acts of March 26, 1910 (36 Stat. 263).

Section 4 of the Act provides:

"That it shall be a misdemeanor for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation or in any way to assist or encourage the importation or *migration* of any contract laborer or contract laborers *into* the United States, unless such contract laborer or contract laborers are exempted under the terms of the last two provisos contained in Section 2 of this Act."

Section 5 provides:

"That for every violation of any of the provisions of Section 4 of this Act the person, partnership, company, or corporation violating the same, by knowingly assisting, encouraging, or soliciting the *migration* or importation of any contract laborer *into* the United States shall forfeit and pay for every such offense the sum of one thousand dollars, which may be sued for and recovered by the United States, or by any person who shall first bring his action therefor in his own name and for his own benefit, * * * as debts of like amount are now recovered in the Courts of the United States"; etc.

The provisos referred to in Section 4 are as follows:

"That skilled labor may be imported if labor of like kind unemployed cannot be found in this country: AND PROVIDED FURTHER, that the provisions of this law applicable to contract labor shall not be held to exclude professional actors, artists, lecturers, singers, ministers of any religious denomination, professors for colleges or seminaries, persons belonging to any recognized learned profession, or persons employed strictly as personal or domestic servants."

Section 22 provides:

"That the commissioner general of immigration * * * shall under the direction of the Secretary of Labor * * * establish such rules and regulations * * * and shall issue from time to time such instructions, not inconsistent with law, as he shall deem best calculated for carrying out the provisions of this Act and for *protecting the United States* and aliens migrating thereto from fraud and loss"; etc.

Under the authority thus conferred, the Department of Labor promulgated, among others, the following rules:

Rule 1, subd. 3—"The head tax shall not be levied on."

* * * * * * * *

"(j) Bona fide seamen who land in the United States pursuant to their calling."

"Rule 10, SEAMEN—Subdivision 1. Who are seamen.—(a) A seaman is any person employed to serve on board a vessel, whose employment is necessary to commerce and navigation and whose name appears on the ship's articles."

* * * * * * * *

"(c) Seamen *whose employment terminates at a port of the United States and seamen who are discharged in a port of the United States* are to be treated as seamen *if it appears that they intend to re-ship* on a vessel bound *to a foreign port,* or to depart from the country within a reasonable time."

"(d) Alien seamen, however, who are insane, idiots, imbecile, epileptics, or person afflicted with tuberculosis or with a loathsome, dangerous, contagious disease, and the existence of whose disease or disability might have been detected by means of a competent medical examination at the time of foreign embarkation, are persons whose employment on board vessels is in nowise necessary to commerce and navigation, and who are, accordingly, *not within the exception in favor of seamen,* because *not within the reason thereof.* The bringing of such seamen to the United States, therefore, is unlawful by the terms of Section 9."

* * * * * * * *

"Subd. 3. Seamen engaged in foreign trade.—Subject to the foregoing limitations and restrictions, *alien seamen* employed on vessels plying between foreign ports and ports of the United States *may, without regard to the provisions of the immigration*

> *law,* land in the United States either on shore leave or on business of the vessel, or *for any purpose incident to their calling, including for the purpose of re-shipping on another vessel* bound to a foreign port as soon as practicable."

The italics in the above quotations are our own.

It will be observed that the above rules permit the discharge of alien seamen in the United States if they intend to re-ship, and generally permit them to land "on *shore leave* or on business of the vessel, or for *any purpose incident to their calling*".

Neither do the rules limit the "re-shipping" to a re-shipment on another *foreign vessel,* but only to "a vessel bound to a foreign port". It may, therefore, be an American vessel.

The rules and regulations express in very plain terms the interpretation placed by the Department upon this law and establish the executive practice with respect to its enforcement. It seems to have been recognized both by the courts and by the executive department that seamen, while engaged in their calling, are not, within the meaning of the law, contract laborers, and that having in view the necessities of commerce, the statute never intended to include them while engaged in the business of their calling.

The rules thus enacted are justified by the controlling decisions upon the subject.

In *Taylor v. United States,* 207 U. S. 124-126, the Supreme Court, in considering the question as to whether or no the bringing of a sailor to the United

States was "bringing an alien to the United States", or permitting a sailor to land was permitting an "alien to land", within the meaning of the Act, said:

> "We assume for purposes of decision that one who makes it possible for an alien to land, by omitting due precautions to prevent it, permits him to land within the meaning of the penal clause in Section 18. But we are of opinion that the section does not apply to the ordinary case of a sailor deserting while on shore leave, and that therefore the judgment must be reversed. We are led to this opinion by what seems to us the literal meaning of the section and *also by the construction that would be almost necessary if the literal meaning seemed to be less plain.*
>
> "The reasoning is not long. The phrase which qualifies the whole section is, 'bringing an alien to the United States'. It is only 'such' officers of 'such' vessels that are punished. 'Bringing to the United States', taken literally and nicely, means, as a similar phrase in Section 8 plainly means, transporting with intent to leave in the United States and for the sake of transport,—not transporting with intent to carry back, and merely as incident to employment on the instrument of transport. So again, literally, the later words 'to land' mean to go ashore. To avoid certain inconveniences the government and the courts below say that sailors do not land unless they permanently leave the ship. But the single word is used for all cases and must mean the same thing for all, for sailors and other aliens. It hardly can be supposed that a master would be held justified under this section for allowing a leper to wander through the streets of New York on the ground that, as he expected the passenger to return and his expectations had been fulfilled, he could not be said to have allowed the leper to land. The words must be taken in their literal sense. 'Landing from such vessel' takes place and is complete the moment the vessel is left and the shore

reached. *But it is necessary to commerce,* as all admit, that sailors should go ashore, and no one believes that the statute intended altogether to prohibit their doing so. *The contrary always has been understood of the earlier Acts, in judicial decisions and executive practice.* If we reject the ambiguous interpretation of 'to land', as we have, the necessary result can be reached only by saying that *the section does not apply to sailors carried to an American port with a bona fide intent to take them out again when the ship goes on,* when not only there was no ground for supposing that they were making the voyage a pretext to get here, desert, and get in, but there is no evidence that they were doing so in fact. Whether this result is reached by the interpretation of the words 'bringing an alien to the United States', that has been suggested, or on the ground that the statute cannot have intended its precautions to apply to the ordinary and necessary landing of seamen, even if the words of the section embrace it, as in *Church of the Holy Trinity v. United States,* 143 United States 457, 36 L. Ed. 226, 12 Sup. Ct. Rep. 511, does not matter for this case. We think it superfluous to go through all the sections of the Act for confirmation of our opinion. It is enough to say that we feel no doubt when we read the Act as a whole."

In *United States v. Sandrey,* 48 Fed. 552-53, Judge Pardee, of Louisiana, gives expression to the following views concerning the interpretation of this law. It was a case where a stowaway had been signed as a seaman and afterwards deserted. The master was charged with a violation of the Act, and the Court said:

"Aliens composing the crews of vessels visiting our seaports are in no sense immigrants, and as the review of the statute as above shows, are nowise affected by the law in question. With regard to them,

the law imposes no duties, nor penalties upon the masters and agents of vessels.

* * * * * * * *

"Prior to his shipment he was a stowaway and destitute, and his purpose may have been to immigrate to the United States, but when he was enrolled as a seaman and signed articles from a voyage from Liverpool to New Orleans and return to Liverpool, his status as a British seaman became fixed. He ceased, for the time being, at least, to be a possible immigrant; and with regard to him the master of the steamship Cuban, the accused in this cause, was charged with no duties, nor exposed to any penalties under the Act of Congress approved March 3, 1891. His desertion after the arrival of the ship at the port of New Orleans in no wise affects the duty or the responsibility of the accused. Murray's legal *status,* if he is now in this country, is not that of an immigrant, but that of a deserter from his ship."

The provisions of the Act are set forth in the decision, from which it can readily be seen that the above language applied to that act, is equally applicable to the Act at present under consideration.

So, in the case of *United States v. Burke,* 99 Fed. R. 896-97-98, the question is treated with considerable fullness, and the fact that the opinion of the Court contains some of the arguments we would address to the Court in the case at bar, is our excuse for a somewhat lengthy quotation:

"The legislation contained in the various statutes that have been passed relating to immigration is clearly directed against the immigration into this country of certain classes of persons who come in with the intent to enter into and become a part of the mass of its citizenship or population. Immigra-

tion is defined to be the entering into a country with the intention of residing in it. The earlier statutes merely prohibit contract laborers being brought in. The later ones prohibit the bringing in of immigrants—persons who come into this country with the intention of remaining, of fixing a residence here—and who are calculated to become a charge upon the country, or who are unfit, on account of moral character, previous conviction of crime, or disease, to be admitted as citizens. Nothing in the scope of the statutes seems to contemplate, or can be rationally held to contemplate, the prohibition of the bringing within the country by vessels of their crews engaged under contracts made out of the country, to labor on the vessels while approaching and while in the ports of this country, and to sail again with the vessels from this country. By Sections 1, 2 and 3 of the Act of February 26, 1885 (1 Supp. Rev. St. U. S., p. 479), it is provided that it is illegal for any person to in any way assist or encourage the *migration* of any alien or foreigner *into* the United States under previous contract with said alien or foreigner to perform labor or service of any kind in the United States, its territories, or the District of Columbia. Such contracts are avoided, and a penalty of $1,000 is imposed for every such offense as to each alien or foreigner. Thus it is made illegal to assist or encourage the *migration* of any alien *into* the United States under previous contract with him to perform labor in the United States; that is to say, it is illegal to assist or encourage any alien to remove or change his residence into the United States under previous contract with him to perform labor in the United States. Now, every foreign seaman on a vessel of this or a foreign country, signed on the articles aboard, is an alien contracted with to perform duty in the United States while the vessel lies in the United States, loading; but he is not contracted with to remove to the United States, or assisted or encouraged to migrate—to change his resi-

dence—to the United States, to perform labor there. It is to be assumed that Congress uses language employed by it in its enactments in its ordinary meaning and acceptation. The particular statute invoked on behalf of the respondent, being that of March 3, 1891, clearly relates to immigration, and is leveled only against immigrants—that is, those who are coming to the United States to make it a home—for in the first section it is declared that certain classes of aliens shall be excluded from admission into the United States 'in accordance with the existing Acts regulating immigration'. The third section excludes the encouragement of immigration to this country of aliens by promise of employment, advertisement, and the like. The fourth makes it unlawful for steamships or transportation companies or vessel owners, by writing or otherwise, to solicit or encourage immigration of aliens into the United States, other than by stating the sailings of their vessels and their facilities. The sixth section forbids the bringing into the United States of any aliens not lawfully entitled to enter, and punishes the offense; and the eighth section provides that upon the arrival by water of alien immigrants at any port it shall be the duty of the master to report the name, nationality, etc., of the alien to the proper officers, and provides for an inspection of these persons before they can be lawfully landed. The tenth section then declares that all aliens who may unlawfully come into the United States shall be sent back on the vessel by which they were brought in at the cost of the master or owner, and, if the said master shall refuse to receive back such aliens as he unlawfully brought to the United States and as were sent back to the vessel or shall refuse or neglect to return them to the port from which they came, he shall be punished in a fine of not less than $300, and shall not have clearance of his ship until it is paid. Here we see a definite purpose to exclude the immigration, and the bringing of persons intending to immigrate, into the United States,

if they belong to the excluded classes, with definite specific provisions for their deportation by the medium through which they entered the country. If this law applied to the crews of ships generally, by Section 6 of this Act, as well as by the section of the previous Act cited in the earlier part of this opinion, *no vessel, foreign or domestic, could lawfully enter the ports of the United States with an alien seaman on board.* I cannot so interpret the law. If it be said that the mere bringing into the United States of these alien seamen may not be an offense, but that landing them would be, notwithstanding the law forbids in the disjunctive—the bringing into 'or' landing—then we have presented by this contention the duty, as one imposed by Congress, that the masters of all ships, American or otherwise, shall either imprison, put under hatches, put in irons, or guard every alien seaman in their crews during their entire stay in port, however protracted by the exigencies to commerce and the ship's loading, lest one of these aliens should set foot at some time on shore for recreation or health, or for supplying his limited needs in the shops of the country. This cannot be the just interpretation of the laws of Congress upon the subject of immigration, and such interpretation is not justified by the terms of those statutes, upon a general survey of them in all their parts. These immigration statutes are to be construed as a whole, and not by singling out particular words or sections, and interpreting them according to their strict letter. A thing may be within the letter of the statute, and yet not within the statute, because not within its spirit, nor within the intention of its makers. 'All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence.' *Holy Trinity Church v. United States*, 143 U. S. 461, 12 Sup. Ct. 512, 36 L. Ed. 228. 'Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the

legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion.' *Lau Ow Bew v. United States,* 144 U. S. 59, 12 Sup. Ct. 520, 36 L. Ed. 344. A consideration of the whole legislation on the subject of alien immigration, of the circumstances surrounding its enactment, and of the unjust results which would follow from giving such meaning to it as is here claimed for it, makes it unreasonable to believe that Congress intended to include a case like the present one. My opinion is that these statutes do not contemplate the exclusion of the crews of vessels which lawfully trade to our ports, and that they do not, in spirit or in letter, apply to seamen engaged in their calling, whose home is the sea; who are here today and gone tomorrow; who come on a vessel into the United States with no purpose to reside therein, but with the intention, when they come, of leaving again, on that or some other vessel, for the port of shipment or some other foreign port in the course of their trade. To hold that these statutes apply to aliens comprising the bona fide crews of vessels engaged in commerce between the United States and foreign countries would lead to great injustice to such vessels, oppression to their crews, and serious consequences to commerce."

The foregoing decision is very much along the same line as that rendered by this Court in the case of *Moffatt v. United States,* 128 Fed. 375-78, in which appear extracts from the foregoing opinions, clearly indicating the approval and adoption by this Court of the principles therein stated. The case of *Holy Trinity Church,* 143 U. S. 457, referred to by this Court as one of the best reasoned cases to be found upon the subject, is a case where the Supreme Court was called upon to construe the Act of February 26, 1885, to prohibit the im-

migration of foreigners or aliens *under contract or agreement to perform labor in the United States.*

It will thus be seen that both the executive and the judicial departments of the government are agreed that seamen are neither within the reason, nor the purpose, of the statute.

But it is suggested that since the above decisions the Act has been so amended as to cover "temporary residence", and that this was effected by an amendment calculated to meet the objections stated in *Taylor v. United States.* The amendment is the omission of the word "immigrant", which followed the word "alien" in the earlier Acts; that is, Section 2, which now reads:

> "That the following classes of aliens shall be excluded from admission to the United States", etc.,

formerly read:

> "That the following classes of 'alien immigrants' shall be excluded from admission into the United States."

This, however, in nowise changes the purpose of the Act, or otherwise affects the question now under consideration. The Act as it now stands is entitled:

> "An Act to Regulate the Immigration of Aliens into the United States",

while the part of Section 2, referring to contract laborers, describes the persons excluded as

> "Persons hereinafter called contract laborers who have been induced or solicited to *migrate to* this country by offers or promise of employment."

Sections 4 and 5, which declare such acts to be a misdemeanor and provide the penalty, describe the prohibited act as the "encouraging or assisting the importation or *migration* of any contract laborer *into* the United States".

In that connection the language of the Act is unchanged.

To "immigrate" and to "migrate to" or "migrate into" are different modes of expressing the same idea. To "*im*migrate" is to "migrate to", or "into", while to "emigrate" is to "migrate from". So far, therefore, as the question of "contract laborers" is concerned, there is no change in the meaning of the statute.

Neither do we regard the language of the Supreme Court in *Taylor v. United States* as attempting to decide the question, but rather to leave it open.

Nevertheless, whatever conclusion we may arrive at regarding the effect of the language in that case upon the application of the Act to "temporary residents" *it does not affect the main issue in the cause,* which was directly decided in *Taylor v. United States,* namely, the direct holding "that the section does not apply to sailors carried into an American port with a bona fide intent to take them out again when the ship goes on". In other words, whether the Act applies to temporary residents or to permanent residents, it does *not* apply to seamen, and until the Supreme Court shall overrule

the case of *Taylor v. United States* we must conclude that that is the law.

It would seem that we need go no further in the discussion of this question.

II.

However, it is urged:

1. That an American vessel is American territory, and hence that the men in question were in the United States when on board the "Mackinaw".

2. That they performed labor on board the vessel *in American ports.*

3. That in going from San Francisco to Grays Harbor they were engaged in coastwise trade.

None of these questions, however, will answer the purpose to avoid the effect of the foregoing decisions.

These men were not engaged in "coastwise trade", because there is no allegation to the effect that *cargo* was being transported between American ports. The mere touching of a vessel at American ports without the transportation and discharge of cargo between those ports is not "coastwise trade". Their contract on the "Mackinaw" is for a voyage "*From San Francisco, Cal., to Shanghai,* China, and such other Asiatic ports as the master may direct, *via* Grays Harbor, Seattle", etc.

So far as being employed in laboring on board the vessel *in* American ports is concerned, that is directly covered by the foregoing decisions.

American Ship, American Territory.—The suggestion that an American vessel is considered as American territory seems rather to strengthen the argument of the courts based upon the "necessities of commerce" than to aid the appellant.

As was said in the case of *Holy Trinity Church v. United States,* and practically in the same language by this Court in *Moffatt v. United States,*

> "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence."

Some of these consequences are pointed out in the case of *United States v. Burke, ante,* but the suggestion that a contract for service by an alien on board of an American ship is a violation of the law because an American ship is American territory, leads to additional unjust and absurd consequences which it could not have been the intention of Congress to promote, and which by the enactment of the rules hereinbefore quoted, it is the plain and evident intention of the executive department to obviate.

Assuming that an American vessel is "American territory", and that the Act prohibits a contract with an alien for the performance of labor upon American territory, we have the result that *an American vessel abroad,* requiring a crew, in whole or in part, *cannot hire any seamen.* When short of a crew in a foreign port, she must either *go out of commission* or "lie by" until "like labor" to be "found in this country" can be transported to the ship—a very effectual means of destroy-

ing all American commerce. Surely Congress did not mean to do this, yet, if we concede plaintiff's contention that seamen are to be included under the term "contract labor" as used in the Act, such is the necessary result of a consistent application of that construction.

So, too, it is suggested that an American ship shipping "aliens" brings the "aliens" within the rule laid down *In re Ross,*

> "By such enlistment he becomes an *American seaman*—one of an American crew on board an American vessel—and as such entitled to the protection and benefits of all the laws passed by Congress in behalf of seamen and subject to all their obligations and liabilities."

Appellant then cites various statutes which render it necessary to permit such "alien contract laborers", because of their thusly acquired character of "American seamen", to be permitted to land on shore. But what of it? That is no greater right than the courts accord to all seamen, whether American or foreign. These landings are in pursuance of their calling as seamen, and are not inconsistent with their re-shipment to a foreign port, when the purpose of their landing is fulfilled. For instance: An American seaman is entitled to go to the United States Commissioner's office to *receive his pay* in the event that he was *transferred to another vessel.* But under the rule laid down by *Taylor v. United States,* if he were an alien seaman on board a *foreign vessel,* he would be entitled to do the same.

> "But it is necessary to commerce, as all admit, that sailors should go ashore, and no one believes that the statute intended altogether to prohibit their

> doing so. The contrary always has been understood of the earlier Acts, in judicial decisions and executive practice'' (207 U. S. 125).

So, too, with his right to be present at a trial for his wages, or his discharge in the United States if the vessel be unseaworthy, or his right to go ashore to make a complaint. So, too, with his return to the United States in the event of the wreck of the ''Mackinaw'', or the duty of the Consul to send him back to the United States if he becomes destitute in a foreign country. Always his contract with the ''Mackinaw'' is that his final port of discharge shall be Shanghai, China. Hence his return to the United States would be only one step toward his return to Shanghai.

Again: What will we say of the intent of Congress with regard to the landing of alien seamen brought here under contract for service, whether on American or foreign vessels, in view of the recent Act of Congress known as the ''Seaman's Act''? Does that show an intention on the part of Congress that alien seamen shall not be landed on American soil? Sections 16 and 17 of the Act of March 4, 1915, provide for the abrogation of all laws which ''relate to the arrest or imprisonment of seamen *deserting,* or charged with deserting from merchant vessels of *foreign nations in the United States* and Territories and possessions thereof''. Does not that provision of the Act indicate the intention of Congress that alien seamen shall be permitted to land upon the territory of the United States? Is it not in effect an Act intended to promote or facilitate the de-

sertion of alien seamen at American ports, and thus recognizing their right to land? Does it not by its very terms recognize the alien seaman as an exception to the law respecting contract labor?

III.

One further observation upon this litigation:

If the rules of the Department are legal, that is, not inconsistent with law, there can be no question of the right of the defendants to do what they have been alleged in this complaint to have done. It is only by declaring those rules void that any hope of recovery can be had in this cause, for the rules, as they stand, have the force of law.

It is said that this is a civil action of debt, and as such is subject to the rules of law applicable to a civil action.

> "Such an action is to be conducted and determined *according to the same rules and with the same incidents* as are other civil actions." *United States v. Regan,* 232 U. S. 46-47; *Grant Bros. v. United States,* 232 U. S. 647."

This action is brought by a *private person for his own benefit,* as, under the law, he is permitted to do. The action, therefore, is an ordinary civil action by one private person against another to recover a debt. The plaintiff's right of recovery, however, depends not only upon the statute, but is further subject to the acts of the government relating to or affecting the cause of action. For instance: If the penalty had been incurred and

the government had thereafter remitted the same, then the plaintiff could not recover. So, also, if the defendant had paid the fine to the government, that act of the government would discharge defendant, and the plaintiff could not recover.

In the present case, the government has enacted rules which, by exempting seamen from the provisions of the Act, has invited and induced the defendant to commit the acts complained of.

The plaintiff must accept the conditions which the government, whether rightly or wrongly, has been pleased to impose. He cannot disavow the act of the government. *Whatever the government has done in the premises, plaintiff has done,* and the question arises, Is not the plaintiff estopped from claiming the penalty? The inequity and injustice of an attempt to penalize the defendants, in the face of such explicit invitation on the part of the government to do the acts complained of, is only too apparent, and nothing but a superior policy of the law could make such injustice successful. Does such policy exist in favor of the plaintiff?

In this connection it must not be lost sight of that, if the government had desired to enforce this penalty, it could have done so by bringing an action. Not having begun such an action is evidence that the government does not approve of the position taken by the plaintiff. And since the plaintiff has, for his own private ends and purposes, and for his own benefit, commenced the action, it is but fair that he should not be permitted to succeed in such an unjust cause unless the Court is

absolutely compelled, by inflexible rules of law whose application cannot be questioned, to permit it.

By this suggestion we do not wish to be understood as admitting the invalidity of the Department rules.

Our main contention is that they are "not inconsistent with law" but are consistent with and an attempt to enforce the law, as the same has been interpreted by the Supreme Court in the cases of the *Holy Trinity Church* and *Taylor v. United States,* as well as other cases hereinbefore referred to.

We respectfully suggest that the judgment should be affirmed.

Dated, San Francisco,
November 1, 1915.

Respectfully submitted,

NATHAN H. FRANK,
Attorney for Defendants in Error.